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No. 73-501

In the Supreme Court of the United States

OCTOBER TERM 1973

C-A 10 Cir. No. 72-1803

PATRICK HENRY EARLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

In the Supreme Court of the United States

OCTOBER TERM 1973

PATRICK HENRY EARLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, PATRICK HENRY EARLEY, by and through his attorney, PETER H. NEY, hereby respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the decision of the United States Court of Appeals, Tenth Circuit, entered on July 20, 1973.

A. REPORTS OF THE CASE IN THE COURTS.

On May 15, 1972, United States District Court for the District of Kansas, the defendant, PATRICK HENRY EARLEY was found guilty, by a jury, of eight (8) of eleven (11) counts of violations of the antiracketeering statute, 26 U.S.C., §1952, the 1968 National Firearms Act, 26 U.S.C. §5801, *et seq.*, and conspiracy, 18 U.S.C. §371.

The defendant was sentenced on May 31, 1972 to a total of twenty-five years. On that same day, the defendant filed a Notice of Appeal.

The Court of Appeals for the Tenth Circuit affirmed the conviction, *United States of America v. Earley*, No. 72-1803 (Appendix A) on July 20, 1973. Petitioner filed a Motion for Extension of Time Within Which to File a Petition for Writ of Certiorari, which was granted by this Court, giving petitioner leave to file said Petition on or before September 19, 1973.

B. JURISDICTION OF THE COURT.

The jurisdiction of the United States Supreme Court is conferred to review the judgment of the United States Court of Appeals, Tenth Circuit, entered on July 20, 1973, by 28 U.S.C. §1254(1).

C. QUESTIONS PRESENTED FOR REVIEW

1. Does repeated testimony elicited from witnesses of unrelated other crimes, wrongs or acts on the part of the defendant when he did not take the stand or place his character in issue violate the defendant's right of due process under the Fifth Amendment of the United States Constitution?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE.

1. Constitution of the United States, Amendment, Article V

> . . . nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law; . . .

E. STATEMENT OF THE CASE.

The petitioner herein, PATRICK HENRY EARLEY, and Wayne E. Porter on October 15, 1971 were indicted in the United States District Court for the District of Kansas with a twelve (12) Count indictment of violations of the antiracketeering statute, 18 U.S.C. §1952, the 1968 National Firearms Act, 26 U.S.C. §5801, *et seq.*, and conspiracy 18 U.S.C. §371. A trial to a jury commenced on May 1, 1972. During the course

of the trial, Porter pleaded guilty to the conspiracy charge, and the remaining two substantive counts in which he was named a defendant were dismissed. The defendant on May 31, 1972 was sentenced to a total of twenty-five (25) years in prison on the various counts of which he was found guilty.

Notice of Appeal was filed on May 31, 1972 and on July 20, 1973, the Court of Appeals for the Tenth Circuit affirmed the conviction. United States v. Earley, No. 72-1803. It is this decision which the petitioner petitions this Court to review by Writ of Certiorari.

On the third day of trial, and during the testimony of witness Virginia McCool, defendant Earley moved the trial court for a mistrial which was denied. The grounds for mistrial were that as a result of unresponsive answers on the part of this witness, the jury had heard testimony of unrelated criminal conduct on the part of this defendant. (p. 13 Appendix hereto). This conduct included the fact that the defendant had been in the penitentiary, (p. 12 Appendix hereto). This witness also testified that she and the defendant had committed various unrelated crimes in other states to which counsel for the defendant objected on the grounds of being unresponsive to the question. The trial court overruled the objection (Tr. 339). Counsel for co-defendant Porter questioned this witness regarding the Mann Act violations in which she and Earley were involved, (pp. 18-21 Appendix hereto). Counsel for Earley objected continually to this line of questioning (pp. 18-21, 22 Appendix hereto) and moved for a mistrial. The objections were both sustained and overruled by the trial court depending upon the circumstances and the motion for mistrial was left undetermined (pp. 18-21, 23 Appendix hereto). This witness also testified that Earley and another went to Louisiana to commit a burglary (Tr. 350).

A witness was questioned by the prosecution on redirect examination regarding from whom she received drugs. She replied that she had received them from someone else, but she did not know if he had received them from Earley (p. 24 Appendix hereto). Counsel for Earley moved to strike this answer which was overruled (pp. 24-25 Appendix hereto).

The prosecution proceeded to ask her if she had ever received drugs from Earley. Witness said Earley had given them to someone else (p. 24 Appendix hereto). Counsel for Earley again objected and moved for a mistrial (pp. 24-25 Appendix hereto). This motion was denied and the jury was admonished to disregard this testimony as to Earley's guilt or innocence in this case, but such testimony was part of the "background", (pp. 25-26 Appendix hereto).

F. BASIS FOR FEDERAL JURISDICTION.

The defendant was charged in the District Court in the District of Oklahoma with violation of 18 U.S.C. §371, 18 U.S.C. §1952, 26 U.S.C. §1952, 26 U.S.C. §5821, and 28 U.S.C. §5861, subsection (f), (d) and (j).

G. REASONS FOR THE ALLOWANCE OF WRIT.

It has long been the rule of this Honorable Court that absent certain delineated exceptions, evidence of other offenses not charged in the indictment is not only inadmissible but prejudicial if admitted. *Boyd v. United States,* 142 U.S. 450, 12 S. Ct. 292, 35 L. Ed. 1077 (1892). This rule forecloses the government from showing the defendant's prior trouble with the law or specific criminal acts until the defendant puts his character in issue. If character or reputation is before the Court, then the prosecution may ask character witnesses if they have heard of prior arrests in order to test the sufficiency of the witness' knowledge. *Michelson v. United States,* 335 U.S. 496, 69 S. Ct. 213, 93 L. Ed. 168 (1948). The stringency and force of this rule prohibits and declares prejudicial the mere placing before the jury of evidence of other crimes committed by the defendant. *Marshall v. United States,* 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 1250 (1959).

The application of this general rule of the inadmissibility and the prejudiciality of evidence of other crimes has been uniformly accepted by the Courts of Appeal. *Freeman v. United States,* 322 F. 2d 426 (D. C. Cir. – 1963); *Tallo v. United States,* 344 F. 2d. 467 (1st Cir. – 1965); *United States v. Tomaiolo,* 249 F. 2d 683 (2d Cir. – 1957); *United States v.*

Rinaldi, 301 F. 2d 576 (2d Cir. – 1963); *United States v. Jacangelo*, 281 F. 2d. 574 (3rd Cir. – 1960); *United States v. Harman*, 349 F. 2d. 316 (4th Cir. – 1965); *Helton v. United States*, 221 F. 2d. 338 (5th Cir. – 1955); *United States v. Rudolph*, 403 F. 2d. 805 (6th Cir. – 1968); *United States v. Smith*, 403 F. 2d 74 (6th Cir. – 1968); *Osborne v. United States*, 351 F. 2d. 111 (8th Cir. – 1965); *Thurman v. United States*, 316 F. 2d. 205 (9th Cir. – 1963); *Sang Soon Sur v. United States*, 167 F. 2d. 431 (9th Cir. – 1948); *Sumrall v. United States*, 360 F. 2d. 311 (10th Cir. 1966); and *Maestas v. United States*, 341 F. 2d. 493 (10th Cir. 1965).

There are five exceptions to the rule prohibiting evidence of other crimes in addition to character when placed in issue by defendant. When such other crimes are relevant to the following, evidence may be admitted to show (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other, and (5) the identity of persons charged with the commission of a crime on trial. It is only in these above circumstances that the probative value of other crimes outweighs its prejudicial effect. *United States v. Acreman*, 434 F. 2d. 338 (8th Cir. – 1970), *Drew v. United States*, 118 U.S. App. D.C. 11, 331 F. 2d. 85 (1964), and *United States v. Lewis*, 423 F. 2d 557 (8th Cir. – 1970). Otherwise, the Courts of Appeal have held the admission of such evidence or testimony to be prejudicial requiring reversal. *United States v. Tomaiolo, supra, Tallo v. United States, supra, Osborne v. United States, supra, United States v. Rinaldi, supra* and *United States v. Jacangelo, supra.*

The purpose of exclusion of prior criminal convictions, arrests or acts is clear. As this Honorable Court stated in *Michelson*, 355, U.S. at 475-76, 69 S. Ct. at 218-219:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such

> **evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. Citing I Wigmore, *Evidence* (3rd Edition 1940) § 57.**

The Tenth Circuit in the instant case held that evidence of other crimes pertaining to defendant Earley was not erroneously admitted even though the defendant had not taken the stand nor put his character in issue. In support of its holding, the Tenth Circuit found such evidence admissible because it was elicited from (1) testimony which resulted from defendant counsel's cross-examination of witnesses for the Government, (2) testimony which was part of the whole story, part of which was brought out by defense counsel in cross-examination and (3) testimony which was brought out by counsel for co-defendant repetitious of matters previously raised by the defendant in cross-examination (pp. 10 Appendix hereto).

It has never been held by the Tenth Circuit or other Courts of Appeal that evidence of other crimes is admissible merely because such testimony was elicited on cross-examination of a witness by counsel for the defendant. To the contrary, the opposite has been the holding of the Tenth Circuit and other Courts of Appeal. The admission of such evidence, according to these courts has required reversal. *Maestas v. United States, supra,* (unresponsive answers were elicited from Government witness during cross-examination by defense counsel that defendant had previously been incarcerated); and *Tallo v. United States, supra,* (unresponsive answer by Government witness on cross-examination by defense counsel indicating defendant had previously been in jail.) In the instant case, the Tenth Circuit was unable to cite any precedent for its proposition. Unresponsive answers regarding unrelated criminal activity has generally been held inadmissible and prejudicial when such testimony is not elicited for the purposes of attacking the sufficiency of a character witness's qualifications, or one of the five enumerated exceptions to this exclusionary rule. *United States v. Rinaldi, supra, United States v. Smith, supra, United States v. Tomaiolo, supra,* and *Sumrall v. United States, supra.* This decision, therefore, is in direct contradiction to the

holdings of the Tenth Circuit in *Maestas* and *Sumrall*, and of the prior holdings by the First, Second and Sixth Circuits.

It has never been held to be an exception to this exclusionary rule that evidence of unrelated criminal activity is admissible as "background evidence or as part of a whole story, part of which was brought out by the defendant." (p. 11 Appendix hereto). Again, the Tenth Circuit was unable to cite any precedent in support of this proposition. Other Circuit Courts, however, have held such evidence to be inadmissible, and prejudicial even where it is part of otherwise relevant testimony. *Sang Soon Sur v. United States, supra,* (admission of a statement on the part of defendant in a trial for tax evasion, in which he disclosed a prior conviction for possession of opium); *United States v. Jacangelo, supra,* (confession of a co-defendant which in part stated that the defendant was unwilling to do certain acts because he was on probation and on bail); and *Helton v. United States, supra,* (a federal agent testified regarding answers to questions elicited by him in which the defendant admitted that he had infrequently and intermittently smoked marijuana for the past four years). Even assuming *arguendo* that there is an exception to the other crimes exclusionary rule for background material, petitioner would submit questions such as those proffered of a witness regarding whether she had received drugs from defendant when she had already denied it, would not serve to establish background (pp. 24-25 Appendix hereto). Since defendant was charged with conspiracy to commit arson, arson, and interstate transportation of firearms and dangerous devices, petitioner submits that such questions are similar to those proffered in *Rinaldi, Smith,* and *Sumrall,* where the prosecutor indirectly elicited or attempted to elicit testimony from a witness as to defendant's prior criminal activity. In any case, this holding of the Tenth Circuit is without precedent, and is in contradiction to holdings of its own Circuit and to holdings of the Ninth, Fifth and Third Circuits.

It has never been held that unrelated criminal activity elicited by questions of counsel for co-defendant covering an area previously brought out by counsel for defendant constitutes an exception to this exclusionary rule. Once again, the

Tenth Circuit failed to cite any precedent in support of this attempted exception (p. 10 Appendix hereto). Counsel for the defendant objected to these questions as being unresponsive and moved for mistrial (pp. 13, 14, 15, 16 Appendix hereto). The purpose of such line of questioning on behalf of counsel for the co-defendant, according to his words, was to attack the credibility of the defendant even though the defendant had not taken the stand on his own behalf (pp. 13, 20-21 Appendix hereto). Petitioner therefore would submit that such questioning is inadmissible and prejudicial to his rights. On its face, this decision is indistinguishable from *Smith, Rinaldi, Tomaiolo* and *Sumrall* (questions by the prosecution) or *Maestas* and *Tallo* (questions by counsel for the defendant).

The Tenth Circuit also implied in its holding in this case that if there was any error in admitting such testimony of unrelated crimes it was cured by a cautionary instruction to the jury to disregard the answers (p. 10 Appendix hereto). Such a ruling is contrary to prior rulings by the Tenth Circuit in *Sumrall* and *Dillion v. United States*, 391 F. 2d. 433 (10th Cir. – 1965) and other circuits in *Rinaldi, Tallo, Tomaiolo, Smith, Thurman* and *Rudolph*. Only the Second Circuit in *United States v. Stromberg*, 268 F. 2d. 576 (2nd Cir. 1959) cert. denied, 361 U.S. 863, 80 S. Ct. 119, 4 L. Ed. 2d, 102, held, in contrast to its prior holdings in *Tomaiolo* and *Rinaldi*, that testimony of previous incarceration of the defendant was harmless error. Since such testimony was a singular incident, the Court held the error to be properly cured by an immediate cautionary instruction to disregard the answer. (268 F. 2d. at 269) In the instant case, however, testimony of unrelated criminal activity was repeated. The Court did instruct the jury twice to disregard such answers, although not in every circumstance in which it arose. (pp. 17-18 and 25-26 Appendix hereto) The trial court further in its second instruction to disregard, indicated to the jury that such evidence was not relevant to the guilt or innocence of the defendant, but was considered as part of the background of the case. (p. 26 Appendix hereto) Even under the reasoning of *Stromberg*, petitioner submits, the Second Circuit under the circumstances of the instant case

would follow its previous holdings in *Rinaldi,* and *Tomaiolo* and those of the other Circuits including the Tenth Circuit, thereby finding the instant testimony to be inadmissible and prejudicial.

The result is that the instant decision rests in direct contradiction to the spirit, if not the holding of this Honorable Court in *Boyd, Michelson,* and *Marshall.* This decision, moreover, is in direct conflict with not only its own Court of Appeal but also the First, Second, Third, Fourth, Fifth, Sixth, Ninth and D.C. Circuits of the Courts of Appeal. The testimony of other unrelated crimes was not proffered by the government nor responsive to questions to establish one of the enumerated exceptions to the exclusionary rule. Accordingly, the overwhelming majority of the Circuit Courts have held such testimony to be inadmissible and prejudicial. There is the very great danger, as this Court stated in *Michelson* that the defendant will be found guilty, not because of his guilt of the crime charged, but because of his bad character and person. To allow this decision by the Tenth Circuit to stand would permit the erosion of this well-established rule and its underlying policy. Such repeated testimony of alleged unrelated criminal activity on the part of the defendant denied him his right to a fair trial under the due process clause of the Fifth Amendment.

CONCLUSION

There presently exists a conflict between the Tenth Circuit within the Tenth Circuit itself and with other Circuit Court of Appeal with regard to the admissibility of unrelated criminal activity. The instant decision stands in conflict with the spirit if not the holdings of this Honorable Court.

This Honorable Court should grant this petition for Writ of Certiorari and resolve this conflict between the Tenth Circuit and the other Courts of Appeal and reaffirm the position taken by this Court in *Boyd v. United States, Michelson v. United States,* and *Marshall v. United States.*

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 1973, I mailed a copy of the above and foregoing Petition for Writ of Certiorari to:

Honorable Robert H. Bork
Solicitor General
United States Department of Justice
Washington, D.C. 20530

and

Mr. Robert Roth
United States Attorney
Post Office Building
Wichita, Kansas

by placing the same in an envelope securely sealed with sufficient postage affixed therefor and depositing the same in the United States Mails.

_____

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OPINION OF THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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TENTH CIRCUIT

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JUL TERM – 1973

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	**No. 72-1803**
PATRICK HENRY EARLEY, *Defendant-Appellant.*	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. W-CR-1402)

Stephen K. Lester, Asst. U.S. Atty., (Robert J. Roth, U.S. Atty., on the brief) for plaintiff-appellee.

Peter H. Ney for defendant-appellant.

Before PHILLIPS, HILL and SETH, Circuit Judges.

PHILLIPS, Circuit Judge.

On October 15, 1971, a 12-count indictment was returned in the United States District Court for the District of Kansas against Patrick Henry Earley and Wayne E. Porter.

Count I charged that Earley and Porter, together with 10 other persons who were named as coconspirators, but not named as defendants, were charged with conspiracy to commit offenses against the United States. Count I further charged that the object, purpose and intent of the conspiracy was to "travel in and cause the travel and use of the facilities of interstate commerce with intent to:

"(a) Distribute the proceeds of an unlawful activity, to wit: arson, in violation of the laws of the State of Kansas, in which state such acts of arson were committed;

"(b) Commit crimes of violence to further the aforesaid unlawful activity; and

"(c) Otherwise promote, manage, establish, carry on, and to facilitate the promotion, management, establishment, and carrying on the unlawful activity of arson."

We think it will be helpful if we set out the provisions of 18 U.S.C.A. § 1952, as follows:

"§ 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises*

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, * * *with intent to–

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Count III charged that Earley on or about August 11, 1968, traveled "in interstate commerce from Wichita, Kansas, to Oklahoma City, Oklahoma, with intent to distribute the proceeds of an unlawful activity, to wit: arson, in violation of the laws of the State of Kansas, wherein the arson was committed, and to carry on and facilitate the carrying on of the unlawful activity of arson, and did thereafter distribute the proceeds of the unlawful activity of arson, and did thereafter at Wichita, Kansas, continue to carry on the unlawful activity of arson, in violation of 18 U.S.C. 1952."

Count IV charged that Earley on or about November 17, 1968, made a firearm, "to wit: a destructive device as defined by 26 U.S.C. 5845(f), without having first filed with the Secretary of the Treasury or his delegate to make and register the destructive device on the form prescribed by the Secretary or his delegate, as required by 26 U.S.C. 5822(a), in violation of 26 U.S.C. 586(f)."

Count V charged Earley with possession on or about November 17, 1968, of "a destructive device as defined by 26 U.S.C. 5845(f), which was not registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5861(d)."

Count VII charged that Earley on or about June 30, 1969, "did transport in interstate commerce from Duncan, Oklahoma, to Wichita, Kansas, a firearm, to wit: a destructive device as defined by 26 U.S.C. 5845(f), which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53 of the Internal Revenue Code of 1954, as amended, in violation of 26 U.S.C. 5861(j)."

Count VIII charged that Earley on or about July 1, 1969, possessed "a firearm, to wit: a destructive device as defined by 26 U.S.C. 5845(f), which was not registered to him in the

National Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5861(d)."

Count IX charged that Earley traveled in interstate commerce "from Oklahoma City, Oklahoma, to Wichita, Kansas, with intent to carry on and facilitate the carrying on of an unlawful activity, to wit: arson, in violation of the laws of the State of Kansas, wherein the arson was committed, and did thereafter at Wichita, Kansas, carry on the unlawful activity of arson by bombing Razook's Thriftway Market, in violation of 18 U.S.C. 1952."

Count X charged that Earley traveled "in interstate commerce from Wichita, Kansas, to Oklahoma City, Oklahoma, with intent to distribute the proceeds of an unlawful activity, to wit: arson, in violation of the laws of the State of Kansas, wherein the arson was committed, and to facilitate the carrying on of the unlawful activity of arson, and did thereafter at Oklahoma City, Oklahoma, distribute the proceeds of the unlawful activity of arson, in violation of 18 U.S.C. 1952."

Earley was convicted on Counts I, III, IV, V, VII, VIII, IX, and X, and found not guilty on Counts II, VI, and XI. Therefore, we have not set out what Counts II, VI, and XI charged.

Count XII of the indictment charged that Wayne E. Porter traveled "in interstate commerce from Wichita, Kansas, to Perry, Oklahoma, with intent to distribute the proceeds of an unlawful activity, to wit: arson, in violation of the laws of the State of Kansas, wherein the arson was committed, and to carry on and facilitate the carrying on of the unlawful activity of arson, and did thereafter distribute the proceeds of the unlawful activity of arson, in violation of 18 U.S.C. 1952."

The case came on for trial on May 1, 1972. Earley appeared in person and by his counsel, Archibald Hill. Porter appeared in person and by his counsel, William C. Farmer and Everett C. Fettis. Mr. Hill informed the court that his home and his automobile had been burglarized early that morning, and that the papers he had prepared for use during the trial had been taken. He moved for a further continuance, which was denied.

The original transcript of the record of the trial consists of 10 volumes, which were filed in lieu of an appendix. If, instead of filing all of the original record, an appendix had been filed, much immaterial matter could have been omitted, and it would have greatly reduced the work of the court.

On the fifth day of the trial, out of the sight and hearing of the jury, Porter pleaded guilty to Count I, the conspiracy count, and Count XI was dismissed as to him and Count XII was dismissed.

After such pleas and dismissals, the jury were returned to the box and the court advised them that Mr. Porter had entered a plea of guilty; that he had conflicting engagements for Monday, May 8, 1972, and that the trial would be recessed until Tuesday, May 9, 1972.

The court very carefully gave the jury the precautionary instruction usually given when there is a recess of a trial.

On Tuesday, May 9, 1972, the trial was resumed, and immediately after the jury had entered the box, the trial judge gave them this further precautionary instruction:

> "The jury will recall that immediately preceding the recessing of the trial last Friday afternoon the Court at that time advised you that the Defendant Wayne Porter had entered a plea of guilty to count one of the indictment, that is, the conspiracy count, before the Court and that the Court had accepted it.
>
> "I further specifically instruct you at this time that this jury may not in any way, in the smallest degree, consider the plea of the defendant Porter as creating any inference or aspect of guilt of the defendant Patrick Henry Earley as to the conspiracy charge set forth in count one of the indictment to which the defendant Porter has entered his plea of guilty, or as to the guilt of the defendant Patrick Henry Earley on any other count of the indictment with which he is charged in this case.

> "The jury is reminded that the indictment charged numerous individuals, specifically ten persons, with being joint conspirators, and the admission of the Defendant Porter, as one of the alleged co-conspirators, cannot be considered in determining the guilt or innocence of the defendant Patrick Earley on any and all counts. You must consider only evidence produced in this courtroom from the witnesses in determining the guilt or innocence of the defendant Earley on each count upon which he is charged."

The trial judge reiterated the above-quoted instruction in his general charge to the jury.

The evidence clearly warranted the jury in finding beyond a reasonable doubt the following facts:

Porter was the owner of several grocery stores situated in Wichita, Kansas. Three of such stores, respectively, known as University IGA Store, Grove IGA, and 21st Street IGA, were located in the northeast section of Wichita. Porter hired Earley, then a resident of Oklahoma, to set on fire or cause to be set on fire during the period extending from July 1968 through July 1969, and during a time of racial unrest in Wichita, the University IGA Store and two stores owned by Porter's competitors. Earley, in turn, hired other persons to set on fire or assist him in setting on fire such three stores.

Such three stores were, in fact, set on fire by persons so hired by Earley, or were set on fire by Earley with the assistance of such other persons. Thus, three acts of arson were committed by Earley, as that offense is defined by the laws of Kansas.

Also, there was ample evidence to justify the jury in finding beyond a reasonable doubt that Earley committed the offenses charged in Counts I, III, IV, V, VII, VIII, IX, and X of the indictment. Earley does not challenge the sufficiency of the evidence adduced to warrant the jury in so finding, but bases his appeal on other alleged errors. Hence, we deem it unnecessary to set out the evidence at length.

Counsel for Earley contends that the trial court erred in overruling his oral motion for a continuance, made when the case was called for trial on May 1, 1972, on his stated ground that his automobile was broken into the preceding night and his briefcase, containing "all his notes, minutes, files, and questions of law and questions to be raised" at the trial, was stolen.

The indictment was returned on October 15, 1971. The arraignments were set for November 15, 1971. The history of the case from that day on reflects one postponement after another, made at the request of Archibald Hill, counsel for Earley, up to and including his motion for a continuance, made on May 1, 1972, on the eve of the trial.

At Hill's request, the arraignments were postponed from November 15, 1971, to December 6, 1971. On the latter date, Earley was arraigned and entered pleas of not guilty as to Counts I to XI, inclusive, and the trial court stated that the case would be set for trial at some date in January 1972. Also, on that date, Hill was given 10 days by the court within which to file motions. On December 16, 1971, Hill filed a motion to extend the time for the filing of such motions until December 21, 1971, because of the fact he was engaged in a session of the Oklahoma Legislature, of which he was a member. On January 10, 1972, an order was made denying the last-mentioned motion. At that time, Hill had not filed any of such motions. Thereafter, argument on such motions was continued by the court until January 17, 1972, because Earley was in jail in Oklahoma on state charges. On January 17, 1972, Hill did not appear, and hearing on such motions was continued by the court until April 4, 1972.

The trial of the case was set for April 18, 1972, but on that date the court was informed that Hill was ill and in a hospital, and the court continued the trial until May 1, 1972.

So far as the record discloses, Hill filed no motions, except for postponements, until May 1, 1972, when he filed a motion for a severance, and on November 12, 1971, when he filed a motion to suppress physical evidence and to suppress evidence of a confession.

The granting of a motion for a continuance rests in the discretion of the trial court, and the denial thereof by such court will not be set aside on appeal in the absence of a clear showing of an abuse of discretion.[1]

The records of the trial show that Hill conducted a vigorous and competent defense of Earley, and there is nothing to indicate that he suffered any handicap by his claimed loss of his "notes, minutes, files, and questions of law and questions to be raised" at the trial. We conclude that the court did not abuse its discretion in overruling such motion for a continuance.

Earley contends that the trial court erred in denying his motion for a severance. In passing on such a motion the trial court has a wide discretion, and the burden is on the movant to show that he suffered sufficient prejudice from the denial of his motion to warrant the appellate court in finding that the trial court clearly abused its discretion.[2]

As a basis for his claim that there was an abuse of discretion, Earley asserts that had there been a severance he would have avoided the prejudice which resulted to him:

(1) When the trial court advised the jury on the fifth day of the trial that Porter had pleaded guilty to the conspiracy count, and

(2) When evidence was adduced at the trial of other criminal acts on the part of Earley.

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1. United States v. Fairchild, 10 Cir., 435 F.2d 972, 973; United States v. Harris, 10 Cir., 441 F.2d 1333, 1335-1336; Johnson v. United States, 8 Cir., 291 F.2d 150, 153, cert. denied 368 U.S. 880; United States v. Hartenfeld, 7 Cir., 113 F.2d 359, 362, cert. denied 311 U.S. 647; United States v. Eagleston, 10 Cir., 417 F.2d 11, 14.

2. Carpenter v. United States, 10 Cir., 463 F.2d 397, 399; United States v. Mallory, 10 Cir., 460 F.2d 243, 248; United States v. Jorgenson, 10 Cir., 451 F.2d 516, 523, cert. denied 405 U.S. 922; United States v. Harris, 10 Cir., 441 F.2d 1333, 1336; United States v. Rogers, 10 Cir., 419 F.2d 1315, 1317.

Since Earley asserts (1) and (2) as separate grounds of error, and since all three claims of error are related, we will proceed to consider all of them at this point.

First, as to the statement by the court to the jury that Porter had pleaded guilty to the conspiracy count. On the fifth day of the trial, after the jury had retired to the jury room, out of the sight and hearing of the jury Porter entered such plea, and Count XI, which charged Earley and Porter jointly with an offense, was dismissed as to Porter, and Count XII, which charged an offense only by Porter, was also dismissed.

Before recessing the trial, which had begun on May 1, 1972, on Friday, May 5, 1972, the court advised the jury that Porter had pleaded guilty to the conspiracy count. He then gave the usual precautionary instruction to be observed by the jury during the recess of the trial, and advised them that he had made prior commitments for Monday and that the trial would be recessed until Tuesday morning, May 9, 1973.

The trial, as to Earley, continued from May 9 to May 15, 1972.

It has long been the law in this circuit and in other circuits that the trial court may inform the jury that a codefendant has entered a plea of guilty, provided the jury is clearly instructed that such a plea cannot be considered as evidence of the guilt of the remaining defendant or defendants.[3]

The instruction given by the court on May 9, 1972, and reiterated in his general charge, fully advised the jury that such plea could not be taken or considered in any way as evidence against Earley, and that they should determine his guilt or innocence on each count by which he was charged with an offense solely on the evidence adduced on the witness stand.

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3. Wood v. United States, 8 Cir., 279 F.2d 359, 363; United States v. Aronson, 2 Cir., 319 F.2d 48, 52; Fahning v. United States, 5 Cir., 299 F.2d 579, 580; United States v. Soares, 10 Cir., 456 F.2d 431, 433; Jiron v. United States, 10 Cir., 306 F.2d 946, 947; Hines v. United States, 10 Cir., 131 F.2d 971, 974.

The reasons for advising the jury that a codefendant has pleaded guilty, and for the instruction given, are obvious.

Porter did not further appear during the several days the trial continued as to Earley. Were not the jury advised and instructed, they might well conclude that Porter had pleaded guilty, and give an erroneous effect to that fact in passing on the guilt or innocence of Earley. In fact, the procedure followed and the instruction given might well have been redounded to Earley's benefit, instead of his prejudice.

We hold that Earley was not prejudiced by the procedure followed with respect to Porter's plea.

We turn now to Earley's claim that evidence of other crimes committed by him was erroneously admitted, and conclude that such claim is not well founded.

In a number of instances, where a witness testified with respect to other crimes committed by Earley, the testimony was brought out by Earley's counsel, Hill, on cross-examination of the Government's witness, Virginia McCool. She would have been called as a witness by the Government against Earley, even though there had been a severance.

In other instances, testimony was part of the whole story, only part of which was brought out by Hill in his cross-examination.

One matter with respect to which counsel for Earley complains occurred in the absence of the jury and could not have done him any harm. Another was a repetition brought out by counsel for Porter of matters theretofore brought out by Hill, counsel for Earley, in his cross-examination of the witness. Moreover, the court instructed the jury to disregard any evidence adduced which tended to show that Earley had been guilty of other crimes than those charged against him in the indictment.

In Count IV, Earley was charged with making a destructive device, without first having filed a written application to make

and register such a device. In Count V, Earley was charged with the possession of the unregistered device he had made. The evidence established that Earley made and possessed the device on November 17, 1968, as charged in the indictment.

In 1968, Congress amended the National Firearms Act and provided that it should be cited as the "National Firearms Act Amendments of 1968." Such amendments became effective on November 1, 1968. The Congressional intent of the National Firearms Act Amendments was to correct the constitutional deficiencies of the former Act, which the Supreme Court held to be unenforceable in Haynes v. United States, 390 U.S. 85, because it required registration almost exclusively by those in illegal possession of a weapon and made this information available for prosecution purposes. The 1968 amendments avoided the problem of extending the registration to all possessors of the weapons, legitimate or otherwise, and "by providing that registration information may not be used directly or indirectly to prosecute a natural person for an offense prior to or concurrent with his registration."

Since the acts charged in Counts IV and V occurred after November 1, 1968, a prosecution for such offenses was legal.

Accordingly, the judgment and sentences of the court on the counts on which Earley was found guilty are hereby AFFIRMED.

TESTIMONY OF VIRGINIA MC COOL
Witness on behalf of Government

Cross-Examination by counsel for co-defendant.

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A. No, sir. I never worked in a club. I worked in a bar once, but I never worked in a club.

Q. That is the only bar you ever worked in?

A. No. When I was eighteen I worked a short time in a bar out on West 13th.

Q. What sort of criminal activities were Mr. Guffy and Mr. Findley involved in at that time, to your knowledge?

A. The only thing I know about is what they were arrested and possibly convicted for. I had no prior knowledge of their criminal activity.

Q. Did they ever discuss their criminal activities with you?

A. No, sir.

Q. And, you never engaged in any criminal activities at all then prior to meeting Mr. Earley?

A. I'll have to stop and think. No, sir.

Q. Well, I am kind of curious, you have painted a picture here of Mr. Earley. And, if your picture is true, why would he select someone like you who is an innocent young lady when he comes to town?

A. Now, I can't tell you why. I can tell you why he told me. Because I had – I knew a lot of the same people that he had known in the penitentiary, so –

Q. Like who?

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A. Like Perry Guffy.

MR. HILL: If the Court please, I'd like to approach the bench.

THE COURT: All right, come up.
(Reporter's note: Thereupon, the following proceedings were held at the bench outside the hearing of the jury:)

MR. HILL: Comes now the defendant, Patrick Earley, and asks this Court to grant a mistrial for the reason upon the grounds that all of this information this witness is giving is not being responsive to the question, such as the last answer she gave about he asked—and I quote, "Why would Mr. Earley choose you as his girl friend?" And then she comes up and says, "Well, when he was in the penitentiary," Judge.

THE COURT: She said, "All I know is what he told me."

MR. HILL: And, then she mentioned the question of the penitentiary. And, that tells the jury that my client was in the penitentiary. That is nothing but prejudicial. It inflames their minds and hurts my client. He can't receive a fair trial with her continuing to do this and making those statements. We ask the Court to declare a mistrial.

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This is just not right, and it is not fair.

MR. FETTIS: We have got a problem here too, your Honor. If I am not allowed to go into all this with her, there is no way I can defend my client, your Honor. She is portraying herself as an innocent child.

MR. LESTER: I don't think so.

MR. FETTIS: She was pure as the driven snow except for a year.

MR. HILL: Judge, I think it is undisputed law in the Courts of all jurisdictions that jurors are not supposed to be given any information concerning the man's prior record unless certain things take place, which have not taken place here. And, I strongly urge the Court to grant a mistrial. I just don't see how the Court can allow her to do it. And, for my client—well—

THE COURT: Well, I'll have the noon recess right now, and we will talk about it a little bit as soon as the jury leaves.

(Reporter's note: Thereupon, the following proceedings were held within the hearing of the jury:)

THE COURT: Ladies and gentlemen of the jury, the Court notices it is now 12:00 or very close thereto. We are going to have the noon recess. We will stand

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in recess until 1:30, at which time we will return and we will continue the trial of the case at 1:30. As you stand at ease, please observe the admonition of the Court, if you will, about discussing the case or permitting anyone to discuss it with you or forming any opinions about it.

(Reporter's note: Noon recess for the jury, 11:55 A.M., May 3, 1972.)

(Reporter's note: The following proceedings held in the courtroom, outside of the presence and hearing of the jury, the defendants being present, commencing at 12:00 noon, May 3, 1972.)

THE COURT: The Court will continue the discussion with counsel on which we embarked at the time I let the jury go for recess, about the objection you had, Mr. Hill.

MR. HILL: Your Honor, may I speak?

THE COURT: Yes, you may speak now.

MR. HILL: Your Honor, my request and motion for mistrial on behalf of my defendant is based on the basic law, and that is that there are many, many cases which will support the position that evidence pertaining to a defendant's prior record, as this lady has just stated, when asked the question about Mr. Earley, said that "when he was in the penitentiary he met some friends

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that knew me" or something to that effect. That this information goes to the jury, and they know about it, and

it prejudices their ability to give this man a fair and impartial trial, which he is entitled to under the laws of Kansas and the constitution of the U.S. Government. And, we don't feel that now at this stage of the proceedings that Patrick Henry Earley can be given a fair and impartial trial before this jury based on these prejudicial statements that that witness continues to make, not being responsive to the question, and especially the last one concerning the fact that he was in the penitentiary. The fact that he was in the penitentiary means that he had a conviction. And, if he had a conviction, the jury was not to know about it unless we presented it. And, we have not. And, we feel very strongly about this position. And, for the furtherance of justice, we ask that this Court grant a mistrial.

THE COURT: What do you say, Mr. Lester? I am interested – I am not going to grant a mistrial; that I will tell you right now. But, I am interested in how to avoid this situation. I more or less think the record will reflect that Mr. Hill invited this. And, I would hesitate to say that, of course, Mr. Fettis told me that he can't cross examine the witness without

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going into this. Do you have any suggestion on how we can avoid it?

MR. LESTER: That is our position, your Honor. I didn't go into anything but the incidents that are charged in the indictment on direct. It is the defendants that have tried to drag this woman through the mud, and they found out they can't do it without getting their own hands dirty, and they are going to have to live with the thing.

THE COURT: That is the way it appears to me, that it has been invited. I don't know how you can keep the truth from the jury. Of course, the antipathy between counsel. Of course, you embarked on the course, Mr. Hill, to bring out everything you could about the defendant–

MR. HILL: Not about the defendant.

THE COURT: I mean, about the witness. And, necessarily, it involved your client, a lot of it. You didn't like the answers.

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THE COURT: I will admonish you now in the future, in the rest of your testimony to avoid references to his past conduct as a convict. I mean, either what he told you about it, or what somebody else told you about it, or what you know, because if there is any more, I don't think we will have a mistrial at this point, Because the evidence has been brought out, I think, mostly by the defendant's attorneys, but if it had been brought out by the United States why we would have been through. But, in any event, to avoid any difficulties in the future, why you can cover everything else, but, I mean, the reference to him having been in the pen, or what, or to what any other person told you about what occurred with Mr. Earley in the pen, it is not material to this case.

WITNESS VIRGINIA MC COOL: Okay.

THE COURT: Except to cause a mistrial.

WITNESS VIRGINIA MC COOL: Okay.

THE COURT: I am going also to now have the jury brought in and instruct them that there is evidence in this case of criminal activities or conduct by the

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the defendants, commencing at 2:10 P.M., May 3, 1972.

THE COURT: Ladies and gentlemen of the jury, during the proceedings this morning and during the course of the taking of evidence there has been some evidence from the witness stand tending to indicate that the defendant Earley at least may have been engaged in some criminal activity in the past and prior to the commission of this offense, or perhaps even during the time of the events of this offense. I want to make it crystal clear that all of that testimony is to be disregarded by the jury. It has nothing whatsoever to do with the guilt or innocence of the defendant Earley in this trial. It is completely extraneous. Some of the answers were perhaps unresponsive, although the Court has looked at the record and it is a question of whether they were invited by the tender of the questions and by the attorneys for the defendants or not. But, in any event the answers that were made and the evidence given has nothing to do with the offense in this case. This defendant here and both defendants are on trial only for specific offenses here, the conspiracy to violate 18 United States Code 1952 by through the crime of arson and related offenses, and only as made in the indictment, and

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none of the evidence has anything to do with the guilt of those defendants, guilt or innocence of the two defendants, if any reference has been made to it. Your job is to sit only on the evidence relating to the events in this case and not to sit in judgment on any past or prior events that may have indiscriminately come out during the course of the testimony in this trial. Now, counsel, will you approach the bench once more and we will then go ahead.

(Reporter's note: Thereupon, the following proceedings were held at the bench outside the hearing of the jury:)

THE COURT: I address my remarks to counsel for the defendant, primarily, and primarily to counsel for the defendant Porter, but it may apply to counsel for the defendant Earley. I don't know. You indicated that the

credibility of Earley is important to you, but I instruct you now not to ask any questions of these witnesses about the past criminal record of Earley.

MR. FETTIS: You are talking about the past criminal conviction record?

THE COURT: Yes, and I am going to take each one of these government witnesses in turn as they . . .

Cross-Examination by counsel for co-defendant.

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you told me that never had been engaged in any criminal activity prior to the Spring of '68 in your entire life, is that correct?

A. I did tell you about the incident that I was mistaken for another person, yes.

Q. But, you didn't do anything. I am talking about your criminal activities?

A. No, sir; I have never been charged with anything.

Q. Well, have you committed any crimes for which you were not charged?

A. No, sir.

Q. And, then do I understand that you have no criminal activities prior to the time you first met the defendant Earley?

A. Just the one with the four people in Kansas City. I knew all of them, yes. I was not with them during the time of their crimes.

Q. And, you have committed no acts of prostitution and you had committed no crimes prior to meeting the defendant Earley? Now, I want to be specific on this.

MR. HILL: I will object, your Honor.

MR. LESTER: I would object to it, too, as being asked and answered several times.

THE COURT: Yes, I think it has, too. I will sustain the objection. I think she has answered your questions.

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MR. FETTIS: All I want to know is if she has for sure answered it, your Honor.

MR. LESTER: Several times.

MR. FETTIS: All right.

Q. (By Mr. Fettis) Now, then you became acquainted with Mr. Earley in the Spring then of '68 and embarked upon your career of crime?

MR. HILL: We object to that too, the form of the question.

THE COURT: Yes, I think the question is objectionable the way it was phrased. I thought the issue here was to determine whether there had been crimes or not.

MR. FETTIS: Well, I thought so too, your Honor.

Q. (By Mr. Fettis) You described trips that you made with Mr. Earley to Oklahoma, numerous trips?

A. Yes, sir.

Q. A trip to California?

A. Yes, sir.

Q. Where else did you go with him?

A. Louisiana.

Q. Anyplace else?

A. Texas

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Q. Is that all?

A. New Mexico.

Q. Is that all?

MR. HILL: Again, we will object. This is totally outside the realm of the issues that we embraced here today, conspiracy. There is nothing alleged in the indictment about–

THE COURT: I understand that. Lay a foundation as to time so we can–

MR. FETTIS: All right.

Q. (By Mr. Fettis) Tell us when you made these trips?

A. We went to California in September.

Q. Of '68?

A. Of '68.

Q. Did you make these trips for the purpose of prostitution?

MR. HILL: Again, we object to it.

THE COURT: Overruled. You are asking her what she did.

Q. (By Mr. Fettis) Did you understand the question?

A. Yes, sir. And, the answer is no.

Q. You did not engage in prostitution on any of these trips?

A. Are you talking–will you go by a specific trip, sir.

Q. Pick out one. Tell me what trip you took in which you

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engaged in prostitution.

A. Only two specifically in Oklahoma.

Q. Two trips that you made to Oklahoma were for the purpose of prostitution?

A. It is very difficult to say if it was specifically for that.

Q. Is it correct to say that Mr. Earley was your pimp during the period of time–

MR. HILL: Again, I object.

THE COURT: Sustained.

Q. (By Mr. Fettis) What was your relationship with Mr. Earley then with respect to your occupation?

MR. HILL: I object, your Honor.

A. I am sorry, I don't understand.

MR. HILL: I think she has testified repeatedly that they were going together, your Honor, I believe.

THE COURT: Again, define it as to time, Mr. Fettis.

Q. (By Mr. Fettis) On the trips that you made to Oklahoma on which events you engaged in prostitution what was your relationship with Mr. Earley?

A. Well, we were going together or living together part of the time.

Q. Did he know that you engaged in prostitution after he

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took you to Oklahoma?

A. Yes, sir.

Q. Was it with his approval then?

A. Yes, sir.

Q. Did you share the money you received from it?

A. No, I didn't share it.

MR. HILL: Object to this line of question as to Mr. Earley.

THE COURT: Yes. I have asked you to define it as to time. Of course, her answer was—did you hear her answer?

MR. HILL; I didn't hear her answer; she had her head down, Judge.

A. I didn't say anything.

Q. (By Mr. Fettis) When did you make these trips to Oklahoma in which you engaged in prostitution with the approval of Mr. Earley, who accompanied you?

A. The one that is most vivid in my mind would have been in October of '68.

Q. Who got the money?

A. He did.

Q. You didn't share in it?

A. I never got any of my money.

Q. Would you say that Mr. Earley's statements to you generally as to his conduct were utterly reliable?

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MR. HILL: Your Honor, I am going to object to that because I —

THE COURT: Sustained, I think it calls for a question of judgment.

Q. (By Mr. Fettis) Did he tell you about or insinuate to you that he was involved in fires that you didn't believe?

MR. HILL: We also object to that question, your Honor.

THE COURT: Sustained.

Q. (By Mr. Fettis) Did he insinuate to you that he was responsible for setting the Yingling fire in which four people were killed?

MR. HILL: Your Honor, we object to that.

THE COURT: Sustained.

MR. FETTIS: Your Honor, I think this goes to their credibility, both of them. It is in the grand jury minutes and I can produce it.

THE COURT: Bring it up. What the grand jury heard and what this jury will hear is two different matters. That is not a trial jury to start with.

(Reporter's note: Thereupon, the following proceedings were held at the bench and outside the hearing of the jury:)

THE COURT: I am going to sustain the objection.

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MR. HILL: Your Honor, for the protection of the defendant, again I ask the Court to grant this defendant—and I have been informed by the Court that the Court will not consider a mistrial—but I do feel that with the flagrant abuse which is existing now with all these various so-called other offenses that Patrick Henry Earley was supposed to have committed which is not embracing the issues in this case, but done solely to inflame the jury, certainly he is entitled to certain rights, and if this continues, certainly, Judge, there is no way that the jury will ignore—

THE COURT: I have already instructed them. This always occurs in this type of situation where there is a course of

conduct. If it had come in from the United States from a witness it probably would have been admissible; however, I don't think it is admissible at this point. There are other ways to test her credibility than that, and we are not testing her credibility before the grand jury. They are two different matters. You have got the statement, but that doesn't mean that everything that happened before the grand jury is going to be printed up in this courtroom.

MR. FETTIS: No, sir. But I am testing his

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credibility on what he said to her which she didn't believe. If she is allowed to believe whatever she wants to believe, and the prosecution – I think that is a salient point.

THE COURT: I think they will be able to get at that by the testimony that has been gone ahead here about their activities since they were together and what they did up here in Kansas.

MR. FETTIS: This goes to the very point of things that he told her.

THE COURT: Well, I am sustaining the objection. Did I come in clear?

(Reporter's note: Thereupon the following proceedings were held within the hearing of the jury.)

Q. (By Mr. Fettis) You told us about making statements to two city detectives, and I believe you testified that you made several oral statements to them over a period of time. Have you made statements to any other law enforcement officers in the course of this investigation?

A. Written statements?

Q. Written or oral.

A. I was questioned in the latter part of September of '71.

Q. And, by whom?

TESTIMONY OF VICKY HENDRICKS

Witness on behalf of Government

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REDIRECT EXAMINATION

BY MR. LESTER:

Q. Do you know Susie's last name?

A. I don't recall it. I just knew her as Susie.

Q. And, do you know her relationship with Mr. Earley at that time?

A. I guess they were just friends.

Q. Do you know if Mr. Earley was staying with her or not?

A. When he was in town I think he did.

Q. Now, on this occasion which you said that you went out, Mr. Earley and Mr. Guffy dug up the metal box, who had furnished you drugs at this time?

A. Randy had them. And, I don't know if he got them from Mr. Earley or –

MR. HILL: We move to strike that, your Honor. It is not responsive to the question. She answered it –

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THE COURT: Overruled.

Q. (By Mr. Lester) Did Mr. Earley ever give you any drugs?

A. He had given them to Randy.

MR. HILL: Again, your Honor, we object, and I would like to approach the bench.

THE COURT: All right, come up anytime, Mr. Hill.
(Reporter's note: Discussion at the bench, among Court and counsel, outside the hearing of the jury, as follows:)

MR. HILL: Comes now the defendant, Patrick Henry Earley, and move to declare this case a mistrial for the reason and upon the grounds again the District Attorney

has allowed the witness to mention other offenses, and under the rules other offenses of other crimes are not admissible unless they fall under certain circumstances. To give pills to persons, drugs, is a crime. And, he has alluded to it, and we have been over it, and I think the law is clear, and he said he would not do it, that we would do it, but he wouldn't. And, that is an offense, and I think we are entitled to a mistrial.

MR. LESTER: Mr. Farmer went into it as to who she got the drugs from, if Randy had given them

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to her.

MR. HILL: Mr. Farmer is a fine lawyer, but he represents Mr. Porter, and I represent Mr. Earley.

THE COURT: Yes. Well, the motion is overruled. I will admonish the jury to disregard it again, if you want to. I talked to them yesterday about it.

MR. HILL: It is as prejudicial as it could be, Judge. There is no question about that. Many, many courts have held that you cannot bring out other offenses, and that is what he has done. And, he asked the direct question, he asked if, "Mr. Earley had ever given you any pills." She said, "I don't know. He may have given them to Randy." or something

THE COURT: Well, overruled. You desire me to admonish the jury?

MR. HILL: No, sir, I do not. If you would tell me first what the admonishment would be –

THE COURT: Just tell them, remind them again, as I did yesterday, that the defendants are only on trial for the offenses charged and nothing else, and they are to disregard. You wish me to?

MR. HILL: All right, it is not a wish, but I don't object to it, Judge.

(Reporter's note: The following proceedings held in the

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presence and hearing of the jury and the defendants.)

THE COURT: Again, ladies and gentlemen of the jury, as I indicated to you yesterday, there are various times, and just here a moment ago there was some evidence that Mr. Earley may have been engaged in some conduct of an illegal nature that is not a part of this lawsuit, and I instruct you specifically that it has nothing to do with his guilt or innocence in this case, and you are to disregard it in that respect and to attach no significance to it at all. It happens to be part of the background and circumstances that are apparently cropping out in this case. Proceed, Mr. Lester, or are you through?

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In the Supreme Court of the United States

OCTOBER TERM, 1973

PATRICK HENRY EARLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims he was denied due process because the jury heard evidence of his prior criminal activity.

Petitioner and co-defendant Wayne Porter were tried by a jury in the United States District Court for the District of Kansas in May 1972. Both were charged in a multi-count indictment with violating the Travel Act, 18 U.S.C. 1952, and the National Firearms Act, 26 U.S.C. 5801, *et seq.*, in connection with various acts of arson, and with conspiring to violate those statutes, 18 U.S.C. 371. During the course of the trial, Porter pleaded guilty to the conspiracy charge, and the two substantive counts in which he was named as a defendant were dismissed. Petitioner continued with the trial and was found guilty on eight of the eleven counts with which he was charged. He was sentenced to a total of 25 years' imprisonment. The court of appeals affirmed (Pet. App.).

The evidence at trial showed that co-defendant Porter owned and operated several grocery stores in Wichita, Kansas. Three of these stores were located in a predominantly Negro section of the community. Porter, during a period of racial unrest in the area, hired petitioner to commit acts of arson against one of Porter's own stores and the stores of two of his competitors. Petitioner obtained the services of others either to commit or to assist him in the commission of the various acts of arson.

Petitioner contends that references to prior criminal acts of his made by witnesses at trial were highly prejudicial and constituted reversible error. Specifically, petitioner cites the testimony of Virginia McCool and Vicky Hendricks (Pet. App. A-12—A-26).

Petitioner's contention is without merit. As the court of appeals noted in its opinion (Pet. App. A-10), it was petitioner's counsel who, in a number of instances, brought out testimony of petitioner's prior criminal acts (Tr. 336-340, 350).[1] Other references to prior criminal acts of petitioner were elicited by counsel for the co-defendant, without objection by petitioner's counsel (Tr. 352). Evidence of other crimes admitted during testimony of witnesses does not generally constitute reversible error where not elicited by the government. *Ashton* v. *United States*, 324 F. 2d 399, 400 (C.A. D.C.).[2]

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[1] "Tr." refers to the transcript of the trial, three volumes of which (including the testimony of witnesses McCool and Hendricks), are being lodged with the Clerk of this Court.

[2] Of the cases petitioner cites as in conflict with this principle (Pet. 4-9), all but three relate to testimony elicited by the prosecution. Of those three, one, *Osborne* v. *United States*, 351 F. 2d 111 (C.A. 8), deals with a grand jury transcript which went to the jury although it was not admitted into evidence and is clearly

The trial court correctly pointed out that petitioner's counsel invited the references to petitioner's past record (Tr. 359-360, 368, 369). Nevertheless, the court at least twice instructed the jury to disregard testimony concerning petitioner's prior criminal acts (Tr. 384, 657), and when improper questions were asked the court properly sustained petitioner's objections (Tr. 397-399). As the court of appeals found (Pet. App. A-6), the evidence against petitioner was ample, and there is no reason to believe the jury disregarded the court's admonition against considering the testimony of prior criminal acts in determining petitioner's guilt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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inapposite. The remaining two—*Maestas* v. *United States*, 341 F. 2d 493 (C.A. 10), and *Tallo* v. *United States*, 344 F. 2d 467 (C.A. 1)—deal with answers given on cross-examination of a government witness. Both emphasize that the responses, which disclosed the defendant's prior criminal record, were non-responsive and thus could not have been predicted. In contrast, the trial court correctly concluded here that petitioner's counsel had invited the references to petitioner's prior criminal activities (Tr. 336-340, 350, 359-360, 368, 369). The court of appeals apparently agreed, noting that much of the testimony was originally elicited by petitioner's counsel (Pet. App. A-10). The cases cited by petitioner also indicate that the trial judge has a wide discretion in determining whether curative instructions will be sufficient, or whether a mistrial is necessary.

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NO. 73-501

In the Supreme Court of the United States

OCTOBER TERM 1973

PATRICK HENRY EARLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner claims he was denied due process because the jury was advised of alleged unrelated criminal activity.

The United States in its Memorandum in Opposition has raised only one argument in opposition to the granting of this petition for Writ of Certiorari. The United States argues

that on several occasions petitioner's counsel at trial brought out testimony of petitioner's criminal acts, or the alleged criminal acts were brought out by counsel for the co-defendant. Without conceding that these instances would not in and of themselves constitute grounds for the granting of a mistrial, petitioner would invite this Honorable Court's attention to the fact that in at least two (2) instances the witness was being questioned by the attorney of the Government. (Pet. App. A24-A26)[1]

The United States' Memorandum in Opposition assumes that no evidence of other crimes of petitioner was presented to the jury through the interrogation by prosecuting attorney. The United States relies exclusively on *Ashton v. United States*, 324 F. 2d. 399, 400 (C.A.D.C.).

The petitioner respectfully submits that the repeated introduction of other alleged criminal activity to the jury by (1) unresponsive answers to counsel's questions, (2) questions eliciting such prejudicial information asked by counsel for co-defendant and (3) questions eliciting such prejudicial responses asked by the United States attorney[2] required the granting of a mistrial. The denial of such a mistrial was reversible error.

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[1] "Pet. App." refers to the Appendix in petitioner's Petition for Certiorari.

[2] On redirect examination of Government witness Vicky Hendricks by the U.S. Attorney, Mr. Lester, asked who had furnished drugs, to which the witness responded she did not know if they had been obtained from Earley. Defense Counsel objected. The Court overruled the objection. The U.S. Attorney then specifically asked the witness whether Earley had *ever* given the witness drugs to which the witness responded that he had given them to another. Counsel moved for mistrial which was denied.

The foregoing appears on pp. 654-657 of the transcript which is reproduced in Petitioner's Appendix (Pet. App. A24-A26)

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App., A-1) is in conflict with prior decisions of the Tenth Circuit, other Circuit Courts of Appeal and with the spirit if not the holdings of this Honorable Court in *Boyd v. United States*, 142 U.S. 450 (1892), *Michelson v. United States*, 335 U.S. 496 (1948), and *Marshall v. United States*, 360 U.S. 310 (1959). To resolve the conflict this Honorable Court should grant the instant Writ of Certiorari.

Respectfully submitted,

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December, 1973

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of December, 1973, I mailed five copies of the above and foregoing Reply Brief for Petitioner to the Solicitor General, Department of Justice, Washington, D.C. 20530 by placing the same in an envelope securely sealed with sufficient postage affixed thereto and depositing the same in the United States Mail.

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